UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

VOCALSPACE, LLC Plaintiff, v. DANIEL D. LORENSO and LARKSPARK CORPORATION, Defendant.	§ § § § § § § § § §	Civil Action No. 4:09-CV-00350

DEFENDANT'S SUR-REPLY TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING DEFENDANT LORENSO'S COUNTERCLAIMS

Defendants ask the court to deny Plaintiff's Motion for Partial Summary Judgment Regarding Defendant Lorenso's Counterclaims. Defendants filed a Response in Docket 147 and Plaintiff's filed a reply in Docket 161. This Sur Reply is in response to Docket 161.

A. Introduction

Plaintiff's Motion for Summary Judgment should be denied, as there simply are too many fact issues that must be decided by the Jury in this case. Rather than do as the Plaintiffs did in their response and basically repeat all the same arguments contained in original motion, Defendants in this surreply will only address new issues raised by the Plaintiff in its response. Defendants stand on their facts and arguments in their well plead Response that contains enough issues that preclude summary judgment at this time.

Argument

Lorenso Declaration

Defendants arguments on the issues of Daniel Lorenso's Declaration filed in Docket 147 shall be addressed in detail in defendants response to motion to strike. Defendants denies that Lorenso's declaration is not sufficient to defeat summary judgment.

Lorenso's Claims are not time Barred

Defendants stand on their arguments as stated in their Response on the issue of Defendants Claims not being time barred. This Court has already ruled on this issue previously in this case in a motion to dismiss and nothing has changed since that ruling.

Vocalspace Failed to Perform

Defendants stand on their arguments as stated in their Response on the issue of Defendants breach of contract claim. Defendants have gone through great detail to show this court that a fact issues exists on whether or not Vocalspace performed its obligations owed to Defendant Lorenso, and Defendants stand on their evidence and arguments as stated in Section C of the Defendants Response to Docket 147.

Lorenso's Claims Do Not Fail Due To Any Ratification

Defendants claims do not fail because they tried to get Plaintiff to honor its agreement to give Defendant Lorenso 10% of VocalSpace. As stated in Defendants response, there remains a controversy as to what agreement actually exists between the parties. Plaintiff in its Sur reply makes the argument that Lorenso's later attempt to exercise the options shows that he agreed to the terms of the Membership Unit Option Plan. Plaintiff makes this statement but does not address the fact there were multiple versions of the Membership Unit Option Plan and that the version that Plaintiff is relying on, Exhibit 103-3 , was never given to Defendants until discovery was exchanged in this lawsuit. See Paragraph 12, Exhibit A to Docket 147.

Lorenso's Promissory Estoppel Claims Do Not Fail

Defendants stand on their arguments as stated in their Response on the issue of Defendants Promissory Estoppel Claims. There is very much a dispute in terms of what is the express contract regarding stock options as detailed in Defendants Response. A fact issue exists here which cannot reconciled as a matter of law.

Lorenso's Fraud Claims Do Not Fail

Defendants stand on their arguments as stated in their Response on the issue of Defendants Fraud Claims. As stated in their Response, Defendants claims that Plaintiff perpetrated a fraud by making the representation that it would grant stock options that were "exercisable immediately" (see Page 3 of 4, Docket 103-5), when it had not intention to do so. Lorenso's fraud claims should remain.

Lorenso's Conversion & Unjust Enrichment Claims Do Not Fail

Defendants stand on their arguments as stated in their Response on the issue of Defendants claims of conversion and unjust enrichment. Defendants did never give Plaintiff permission to take their code and grant exclusive rights to third parties in the code.

Plaintiff denies the existence of the Independent Contracts Agreement, calling it a forgery. Given defendants have produced into evidence a signed version of the Agreement, this issue is very much a major fact issue. The Independent Contracts agreement specifies who owns the Code after January 8, 2007, which is the Defendant. *See Paragraph XV to Exhibit C to Docket 147*. This is not a Joint work, but rather code will be owned by the Defendant. Id. A fact issue exists here due to the question of the validity of the Independent Contactors Agreement.

The Womens Network agreement is very relevant to Defendants unjust enrichment claim. As shown in Exhibit E to Docket 147, the original 2004 agreement with Womens Network was extended into 2009 and hence is very relevant to the time frame in 2009.

Conclusion

This Court should deny Plaintiff's Motion for Partial Summary Judgment Regarding Defendant Lorenso's Counterclaims. There is evidence of facts that if viewed in the light most favorable to the defendant they create issues that must be decided by the Jury which preclude summary judgment at this time.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2010 a true and correct copy of the foregoing sur reply to Plaintiff's Motion for Partial Summary Judgment Regarding Defendant Lorenso's Counterclaims has been electronically filed on the CM/ECF system, and sent via email to Neal Massand (opposing Counsel).

/s/ Ernest P. Nycz____________
ERNEST P. NYCZ